

FEDERAL CIRCUIT COURT OF AUSTRALIA

SINGH v MINISTER FOR IMMIGRATION & ANOR

[2018] FCCA 3513

Catchwords:

MIGRATION – Skilled visa – bogus documents – applicant fails to respond on two occasions to invitation to comment on adverse material – reasonable suspicion that document is bogus – factual foundation of reasonable suspicion – cumulative effect of factors supporting conclusion document bogus – innocent errors are not target of PIC 4020 – quality of purposeful falsity – invitation to comment – consequence of failure to comment – Tribunal has no power to permit applicant to appear at oral hearing – no want of procedural fairness – no error respecting bogus documents – criteria not satisfied – no compassionate or compelling circumstances to waive criteria – application dismissed.

Legislation:

Federal Circuit Court Rule 2001 (Cth), rr 2.08B, 7.01

Migration Act 1958 (Cth), ss. 5, 65, 359, 359A, 359C, 360, 363A, 379A

Migration Amendment Regulations 2011 (No 1) (SLI 13 of 2011), reg 5

Migration Regulations 1994 (Cth), Sch 2 cl. 485.216, 485.224, 886.225

Cases cited:

Hasran v Minister for Immigration and Citizenship (2010) 183 FCR 413

Patel v Minister of Immigration and Border Protection (2015) 145 ALD 566

Plaintiff S157/2002 v Commonwealth of Australia (2003) 211 CLR 476

Pokharel v Minister for Immigration and Border Protection [2016] FCAFC 34

Shrestha v Minister for Immigration and Border Protection (2018) 92 ALJR 798

Singh v Minister for Immigration and Border Protection [2017] FCAFC 105

Singh v Minister of Immigration and Border Protection [2018] FCAFC 52

Sun v Minister for Immigration and Border Protection (2016) 243 FCR 220

Trivedi v Minister of Immigration and Border Protection (2014) 220 FCR 169

Applicant:

MANDEEP SINGH

First Respondent:

MINISTER FOR IMMIGRATION &
BORDER PROTECTION

Second Respondent:

ADMINISTRATIVE APPEALS
TRIBUNAL

File Number: MLG 625 of 2017
Judgment of: Judge A Kelly
Hearing date: 28 November 2018
Date of Last Submission: 28 November 2018
Orders Pronounced 28 November 2018
Delivered at: Melbourne
Delivered on: 30 November 2018

REPRESENTATION

The Applicant: In person
Counsel for the First Respondent: Mr McDermott
Solicitors for the Respondents: DLA Piper

ORDERS

- (1) Pursuant to r.7.01(1)(a) of the *Federal Circuit Court Rules 2001* (Cth) the title of the first respondent be amended to *Minister for Immigration, Citizenship and Multicultural Affairs*.
- (2) The application filed on 28 March 2017 be dismissed.
- (3) The applicant pay the costs of the first respondent fixed at \$6,859.
- (4) Pursuant to r.2.08B(3)(a) of the *Federal Circuit Court Rules 2001* (Cth) all documents comprising the court file in this proceeding, save for the Orders of the Court, be kept confidential and not made available for inspection except by Order of this Court.
- (5)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT MELBOURNE

MLG 625 of 2017

MANDEEP SINGH

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

Introduction

1. By application filed on 28 March 2017, judicial review is sought of a decision of the Administrative Appeals Tribunal (*Tribunal*) made on 16 March 2017 affirming a decision of a Delegate of the first respondent (*Minister*) not to grant the applicant a Skilled (Residence) (Class VB) visa pursuant to s 65(1)(a) the *Migration Act 1958* (Cth) (*Act*).

Background

2. The applicant, an Indian citizen aged 32 years, first arrived in Australia on 25 November 2006.

3. On 29 December 2008, the applicant applied, with the assistance of his registered migration agent, for a Skilled (Class VB) (Subclass 886) visa. The applicant listed his nominated occupation as Pastry cook, relying on a skills assessment from Trades Recognition Australia (*TRA*) dated 27 October 2008 (*skills assessment*).
4. The skills assessment was based upon ~900 hours work experience, which was evidenced in an undated work reference from O’Hea’s Bakery & Deli (*Work Reference*).
5. On 4 October 2011, the Department wrote to the applicant requesting further information regarding his visa application including evidence of his stated 900 hours of work experience.
6. On 31 October 2011, the applicant sent the Department certain documents. On 11 November 2011, the applicant’s representative submitted the same documents to the Department which included a copy of the TRA skills assessment.
7. On 6 January 2012, the Department wrote to the applicant inviting him to comment on information that he had supplied with his visa application. The Department’s letter stated that a person which it identified, had entered a plea of guilty to the manufacture and sale of work references “*matching the one submitted to [TRA] to obtain your skills assessment.*” It would later emerge that the person convicted of that offence had been a teacher of the applicant.
8. On 3 February 2012, the applicant’s representative responded to the invitation to comment and sent a sworn statement of the applicant asserting that his experience was genuine. The applicant and his representative accepted that the convicted person had been the applicant’s teacher.
9. On 22 February 2012, the applicant’s representative advised the Department he was no longer acting on the applicant’s behalf. In October 2014, the Department and the applicant engaged in communications to establish new contact details for the applicant.
10. On 13 October 2014, the Department wrote to the applicant advising him that the skills assessment was considered to be a bogus document within the meaning of the Act. The applicant was afforded an

opportunity to comment and did so, contending on this occasion that the assertion the skills assessment was bogus was totally baseless.

11. On 17 November 2014, a Delegate of the Minister refused the application on the substantive bases that on a review of all available evidence, the Delegate was satisfied that: (1) the skills assessment from TRA was a bogus document; (2) no compassionate or compelling circumstances were shown as to justify waiver of criteria which governed the grant of the visa.
12. On 3 December 2014, the applicant applied to the then Migration Review Tribunal, for a merits review of the Delegate's decision.
13. By letter dated 24 April 2015, the applicant was invited to comment on information that suggested the applicant may have provided a bogus document, being the skills assessment. The letter explained the two bases on which the skills assessment was considered to be bogus. Although invited to comment, the applicant did not do so.

Tribunal decisions

14. The application for merits review was the subject of two decisions.
15. In relation to the first decision, the Tribunal found that the applicant had lost his entitlement to attend a hearing (see below).
16. On 23 December 2015, the parties agreed in orders that the Tribunal's first decision made on 3 July 2015 be quashed and that the matter be remitted for reconsideration. The Minister conceded that the Tribunal had breached s 359A with respect to adverse information which had been relied upon in its decision and which had not been disclosed to the applicant as information which would be the reason or a part of the reason for affirming the decision.
17. By letter dated 24 February 2017, the Tribunal invited the applicant to attend a further hearing.
18. By a further letter dated 24 February 2017, the Tribunal again invited the applicant to comment on information which it considered would be the reason or a part of the reason for affirming the decision under review. This letter attached a detailed agreed statement of material

facts in the criminal proceeding involving the person who had been convicted of the manufacture and sale of work references as referred to above at [7], a copy of their police statement (which was extensive) and an order permitting the disclosure of those documents. The letter invited the applicant to comment on or respond to the information set out in the letter and fixed the time for a response at 10 March 2017: s 359.

19. Again, the applicant did not comment on that adverse information.
20. On 16 March 2017, the Tribunal affirmed the decision under review. The Tribunal again found that the applicant had lost his entitlement to attend a hearing pursuant to the provisions addressed below.
21. The Tribunal found that the skills assessment was made on the basis of 900 hours' work experience, and that the applicant claimed to have completed this work experience at O'Hea's Bakery & Deli: [9].
22. The Tribunal had regard to the adverse information, which had been set out in its letter dated 24 February 2017 to the applicant: [11].
23. The Tribunal also had regard to the applicant's claims that he had: (a) performed work experience; (b) was not required to log in and out as he was not a paid employee; (c) been given the Work Reference by his employer; (d) acknowledged that the person convicted of manufacturing false records had been one of his teachers: [18], [21]. It found that the applicant had not responded to the adverse information put to him and had not responded at all to the adverse information that he could not have commenced work at O'Hea's Bakery & Deli on the dates which he had claimed since he had only arrived in Australia after this time: [21]-[22].
24. The Tribunal found that:
 - a) it was not satisfied that the medical evidence provided by the applicant supported a claim that there were medical reasons for failure to respond to the invitation to comment: [19]-[21].
 - b) it reasonably suspected the skills assessment had been obtained because of a false or misleading statement, being that the

applicant had worked for O’Hea’s Bakery & Deli, both over the period, and for the number of hours, stated: [25];

- c) the skills assessment was a bogus document: [25];
- d) having regard to the email from the applicant’s former migration agent supplying the skills assessment, it was not satisfied that there was no evidence that the applicant had given or caused to be given to the Minister a bogus document: [25].

25. Having concluded that the applicant did not satisfy a criterion which was applicable to a skilled visa, the Tribunal considered whether there were, and decided that there were no, compassionate or compelling circumstances that would justify the Tribunal to waive the applicable visa criteria: [26]-[34]. It concluded that the applicant did not satisfy cl 886.225 of Sched 2 to the *Migration Regulations 1994* and accordingly affirmed the decision under review: [35].

Procedural history

26. On 28 March 2017, the applicant filed an application for judicial review of the Tribunal’s decision made on 16 March 2017.
27. The applicant swore an affidavit on 16 March 2017 which annexed a copy of the Tribunal’s decision but which otherwise adduced no evidence in support of the application.
28. By a Response filed on 5 May 2017, the Minister opposed the orders sought on the grounds that no arguable case for relief was raised.
29. On 27 September 2017, orders were made, by consent, listing the matter for final hearing. By those orders, the applicant was afforded the opportunity to file any amended application with proper particulars of the grounds, a supplementary court book and written submissions in support of the application. The applicant did not take the opportunity to file any further material.

Consideration

30. The Tribunal's second decision is not amenable to judicial review unless it is shown to be vitiated by jurisdictional error.¹

31. The applicant relies upon two grounds of review which read:

The Tribunal failed to accord me the procedural fairness and natural justice as prescribed in Migration Law

The Tribunal failed to comply with s359A of the Migration Act 1958

Particulars

1. The Tribunal committed error by failing to give in accordance with s 359A of the act, clear particulars of the followings

2. The Tribunal has failed to give me an opportunity and to address the issues and grounds upon which the visa was refused under classes as set out in the [Act] and [Regulations]. . .

3. The Tribunal made a decision disregarding my evidence submitted and assessing the documents and evidence I submitted in paper form

4. Tribunal relied on my statements and documents. My work experience letter issued by my employer O'Hea's Bakery and Deli which I used for my skill assessment from [TRA] was wrongly assessed as bogus documents by [Department] and AAT failed to accept facts and information submitted.

32. The applicant's grounds complain that the Tribunal failed to comply with s 359A and that the Tribunal erred in concluding that the applicant had provided a bogus document to the Department.

Tribunal complied with s 359A

33. Where a person is invited pursuant to s 359 to comment on adverse information and does not do so, the Tribunal may make a decision on review without taking any further action and in that event, the applicant may not appear at a hearing before the Tribunal: ss 359C(2), 360(2)(c), 360(3). In such circumstances, the Tribunal has no power, relevantly,

¹ *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 at [76] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.

to permit the applicant to appear at an oral hearing: s 363A: *Hasran v Minister for Immigration and Citizenship* (2010) 183 FCR 413, [10]-[18] (Jacobson, Gilmour and Foster JJ). Nonetheless, the exhaustive statement of the natural justice hearing rule operates only in relation to the matters with which it deals. For that reason, it remained open to the applicant to provide a written statement and written arguments notwithstanding the cascading operation of ss 359C(2), 360(2)(c), 360(3) and 363A : *Singh v Minister for Immigration and Border Protection* [2017] FCAFC 105, [59] (Mortimer J, Jagot and Bromberg JJ agreeing). The applicant did not comment on the adverse information but did exercise the opportunity to provide a written submission.

34. I am satisfied that the Tribunal complied with its obligations under s 359A. The Tribunal's letter dated 24 February 2017 set out and attached all of the information that the Tribunal ultimately relied upon in determining the review. It explained why the information was relevant to the review, and the consequences of the information being relied upon in that process of review. It invited the applicant to comment on or respond to the information. Moreover, it indicated that the applicant could request an extension of time to respond.
35. I am satisfied that the Tribunal's letter dated 24 February 2017 was transmitted by email to the applicant's last known address (being the applicant's email address provided on the review application form dated 3 December 2014 and the email address used in this application): s 379A.
36. As the applicant had not responded to the invitation to comment, the cascading effect of ss 359C(2), 360(2)(c), 360(3) applied with the result that the Tribunal had no power, relevantly, to permit the applicant to appear at an oral hearing: s 363A; *Hasran, supra*. The Tribunal was correct to conclude that the applicant should not appear: [5].
37. Ground 1 is rejected.

Document was bogus

38. Criteria for the grant of the subject visa were set out in Part 886 of Sched 2 to the Regulations which were amended by the *Migration*

*Amendment Regulations 2011 (No 1) (SLI 13 of 2011) (**Amendment Regulations**).*

39. Relevantly, cl 886.225 was amended after the applicant's visa application was lodged on 29 December 2008. The Amendment Regulations commenced operation on 2 April 2011. Amendments effected by Sched 3 of those regulations applied in relation to a visa application which had been made but not finally determined before 2 April 2011: reg 5(2), Amendment Regulations.
40. Items 3-4 of Sched 3 of the Amendment Regulations amended cl 886.225 so as to include a requirement that an applicant meet Public Interest Criterion 4020. As a result, by cl 886.225(a) as amended, the applicant was required to satisfy that criterion (amongst others).
41. Public Interest Criterion 4020 (**PIC 4020**) required as follows:

4020

(1) *There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Migration Review Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:*

- (a) *the application for the visa; or*
- (b) *a visa that the applicant held in the period of 12 months before the application was made.*

...

(4) *The Minister may waive the requirements of any or all of paragraphs (1) (a) or (b) and subclause (2) if satisfied that:*

- (a) *compelling circumstances that affect the interests of Australia; or*
- (b) *compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;*

justify the granting of the visa.

(5) *In this clause:*

information that is false or misleading in a material particular means information that is:

- (a) false or misleading at the time it is given; and*
- (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.*

Note Regulation 1.03 defines bogus document as having the same meaning as in section 97 of the Act.²

- 42. The target of PIC 4020 is not aimed at errors which are innocent. Equally, PIC 4020 is directed to secure the result that a visa applicant bears ultimate responsibility for the veracity of information which is provided.
- 43. To attract the operation of PIC 4020 “an element of fraud or deception is necessary.” For that reason, “PIC4020 is directed to information or documents which are purposely untrue”: *Trivedi v Minister of Immigration and Border Protection* (2014) 220 FCR 169, [33], [49] (Buchanan J, Allsop CJ and Rangiah JJ agreeing); *Patel v Minister of Immigration and Border Protection* (2015) 145 ALD 566, [7] (Edmonds, Buchanan and Flick JJ); *Singh v Minister of Immigration and Border Protection* [2018] FCAFC 52, [6] (Bromberg J, *diss*), [76], [144] (Griffiths and Moshinsky JJ).
- 44. However, for PIC 4020 to be engaged, it is not necessary that a visa applicant is aware that information supplied is purposely untrue. In *Trivedi v Minister of Immigration and Border Protection* (2014) 220 FCR 169, Buchanan J said (Allsop CJ and Rangiah JJ agreeing) at [49]:

45. . . . *it should be accepted that PIC 4020 is directed to information or documents which are purposely untrue. It seems to me to be clear from the same analysis that **the purpose of PIC 4020 was to render visa applicants ultimately responsible for the veracity of the information and documents supplied to support the application. Although the limited terms of the waiver (and therefore any discretion to excuse non-compliance) make it apparent that innocent errors are not the focus of attention, it is equally clear that PIC 4020 is directed at the overall integrity of the visa system and***

² Now see definition of Bogus documents in s 5(1).

as a bulwark against deception and fraud from any quarter associated with a visa applicant. It is not inconsistent with a coherent public policy to make a visa applicant ultimately responsible for purposely untrue material provided with a visa application. It would be an intolerable burden on the administration of the visa system to require that those assessing visa applications not only discover that information or documents are false in a material particular, but also that the visa applicant who provided them knew them to be so. In many cases that would be impossible and would defeat the apparent intent of the provision.
(emphasis added)

46. The applicable principles were analysed comprehensively by Griffiths and Moshinsky JJ in *Singh v Minister for Immigration and Border Protection* [2018] FCAFC 52 who stated at [144(4)]:

47. *Where an issue of the proper construction or application of PIC 4020 is raised, Trivedi and Patel authoritatively state that where a visa applicant has given or caused to be given to a relevant decision-maker a document which is a “bogus document” as defined, or information that is false or misleading in a material particular as defined, to determine whether PIC 4020 is satisfied or not, **it is not necessary to show knowing complicity by the visa applicant as long as the material is purposely untrue.*** (emphasis added)

48. Their Honours proceeded to identify at [144(5)] that the potentially harsh consequences of PIC 4020 may be ameliorated by the adoption of a particular stance in cases where fraud is in issue: see also [148], [154].

49. I consider that the Tribunal correctly identified the applicable principles when applying PIC 4020: [13]-[17].
50. I am satisfied that on the whole of the evidence that was before the Tribunal, it was reasonably open to it to conclude that PIC 4020(1) was not satisfied:

- a) PIC 4020(1) required that there be *no* evidence before the Minister that the applicant had given a bogus document in relation to the visa application;
- b) by s 5(1), a bogus document was relevantly defined to include a document that the Minister reasonably suspected to have been obtained because of a false or misleading statement, whether or not made knowingly;
- c) there was ample evidence before the Tribunal, upon which it relied, that the Work Reference contained false or misleading statements and that the skills assessment was obtained because of those false or misleading statements;
- d) it was open to the Tribunal on the material before it to find that the skills assessment was a bogus document and to reject the applicant's claim to the contrary.

51. This was not a case in which there was no evidence. To the contrary there was evidence, the cumulative effect of which, objectively, provided a factual basis to support the conclusion for reasonable suspicion that the TRA skills assessment was bogus: cf *Sun v Minister for Immigration and Border Protection* (2016) 243 FCR 220, [82]-[87] (Flick and Rangiah JJ, Logan J agreeing generally). The Tribunal's analysis supports the conclusion that it held such suspicion and that the applicant bore ultimate responsibility for the provision of the bogus document: [18]-[26].

52. Further, it was open to the Tribunal to conclude that PIC 4020(1) should not be waived.

- a) the Tribunal correctly summarised the circumstances in which the requirements of PIC 4020(1) could be waived: [27]-[30].
- b) as noted by the Tribunal, the applicant had not addressed the waiver provision, despite being afforded several opportunities to do so: [32]. The Tribunal nonetheless considered the evidence before it as to the applicant's circumstances in proceeding to determine whether the waiver provision in PIC 4020(4) was satisfied. This evidence included medical evidence about the applicant, which, was found not to satisfy PIC 4020(4): [33].

53. Ground 2 is rejected.

Conclusion

54. As the applicant was self-represented, I have re-examined the materials comprised in the court book and the Reasons. As can be seen in the Reasons at [13], the Tribunal referred erroneously to cl 485.224 of the Regulations. I consider the erroneous reference at [13] to the incorrect regulation to be immaterial. While cl 485.224 does not refer to PIC 4020, cl 485.216(3) does so. More importantly, the Tribunal concluded that the applicant did not satisfy cl 886.225 and on that basis, affirmed the decision under review: at [35]; *Shrestha v Minister for Immigration and Border Protection* (2018) 92 ALJR 798, [10] (Kiefel CJ, Gageler and Keane JJ); *Pokharel v Minister for Immigration and Border Protection* [2016] FCAFC 34, [48]-[51] (Buchanan, Perram and Rangiah JJ). Otherwise, I do not discern any aspect of the Tribunal's conduct during the process of review or in the Reasons as to indicate a basis on which the applicant might otherwise complain of jurisdictional error affecting the decision to affirm the decision to refuse the visa application.

55. For the reasons above, the application was dismissed.

I certify that the preceding fifty-two (52) paragraphs are a true copy of the reasons for judgment of Judge A Kelly

Associate:

Date: 30 November 2018